



December 20, 1999

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health & Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR99-3682

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 128867.

The Texas Department of Mental Health and Mental Retardation (the “department”) received a request for documents relating to a medicaid managed care procurement conducted by the department and the Texas Commission on Alcohol and Drug Abuse. You state that the requestor has narrowed her request to exclude tax return and client-identifying information. You claim that portions of the remaining responsive documents are excepted from disclosure under section 552.107 of the Government Code. You also assert that some of the responsive documents contain proprietary information which may be excepted from disclosure under section 552.110. We have considered the submitted arguments and have reviewed the information at issue.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, you notified Magellan Behavioral Health of Texas, Inc. (“Magellan”), and ValueOptions Behavioral Health of Texas, Inc. (“ValueOptions”) about the request for information. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Magellan and ValueOptions responded to the notification by arguing that portions of their proposal responses are protected under sections 552.101, 552.104, and 552.110.

Both Magellan and ValueOptions assert that the telephone numbers, social security numbers and addresses of their employees are protected by common-law privacy.¹ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 also encompasses the doctrine of common-law privacy. Information is protected by common-law privacy if it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). This office has concluded that telephone numbers, addresses, and social security numbers are not excepted from disclosure under common-law privacy. Open Records Decision No. 455 (1987). However, the social security numbers are confidential if the department obtained or maintained them pursuant to any provision of law enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994).

The companies also argue that portions of the submitted proposal responses are confidential by law. Magellan argues that a portion of its proposal response is protected as confidential medical committee information. Section 161.032 of the Health and Safety Code makes confidential the “records and proceedings of a medical committee.” While the records and proceedings of a medical committee are confidential, the confidentiality does not extend to “records made or maintained in the regular course of business by a hospital.” *Id.* § 161.032(c); Open Records Decision No. 591 (1991). After reviewing the documents at issue, we conclude that this information is not protected under this Health and Safety Code provision.

ValueOptions argues that its provider contracts with behavioral health care providers are made confidential by article 20A.17(b)(2) of the Insurance Code. Article 20A.17(b)(2) provides that:

A copy of any contract, agreement, or other arrangement between a health maintenance organization and a physician or provider shall be provided to the commissioner by the health maintenance organization on the request of the commissioner. Such documentation provided to the commissioner under this subsection shall be deemed confidential and not subject to the records law, Chapter 552, Government.

¹Magellan also argues that this information is protected by section 552.102 of the Government Code. We note that section 552.102 only protects the privacy interests of public employees. The department does not assert that the responsive information is protected under section 552.102; therefore, we must presume that the exception is inapplicable in this instance.

The contracts at issue were provided to the department as part of the bidding process and not in response to a request by the commissioner. Therefore, we do not believe that this provision of the Insurance Code is applicable to the submitted contracts.

Magellan also argues that its proposal information is protected from disclosure under section 552.104. We note that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. Open Records Decision No. 592 at 8-9 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The department has not argued that release of the requested information would harm a particular competitive situation. In fact, it appears that the contract has already been awarded. Therefore, Magellan's proposal information may not be withheld under section 552.104.

Finally, both Magellan and ValueOptions argue that their proposal information is excepted from disclosure under section 552.110. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with

regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).²

Section 552.110(b) excepts from required public disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *See generally National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information.

After reviewing their arguments and the submitted information, we conclude that Magellan and ValueOptions have demonstrated that portions of their respective proposal responses are protected from disclosure under section 552.110. The remaining information is not protected from disclosure under section 552.110 and must, therefore, be released. We have marked the documents to indicate which information the department must release. Information that is not specifically marked for release must be withheld under section 552.110.

Finally, the department argues that the documents submitted as Exhibit K are excepted from public disclosure under section 552.107. Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* Moreover, documentation of calls made, meetings attended, or memos sent

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company’s] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

is not protected under this exception. *See* Open Records Decision Nos. 589 (1991), 212 (1978) (even though the content of a communication might be confidential, the fact of a communication is ordinarily not excepted from disclosure); *see also* Tex. R. Civ. Evid. 503(a)(5) (a communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services); Open Records Decision No. 574 at 5 (1990). We conclude that most of the information at issue contains client confidences, attorney advice, or opinion. Hence, the department may withhold this information from public disclosure pursuant to section 552.107(1). We have marked the document in Exhibit K that is not protected by section 552.107 and must, therefore, be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

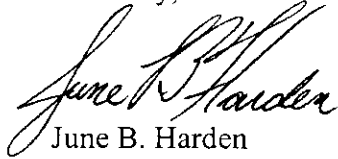
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "June B. Harden", written in a cursive style.

June B. Harden
Assistant Attorney General
Open Records Division

JBH/jc

Ref: ID# 128867

Encl. Marked documents

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